83 - 594

No.

In the Supreme Court of the United States

October Term, 1983

JANET E. PITTS, Administratrix, etc.,
Petitioner,

vs.

UNARCO INDUSTRIES, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit

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QUESTIONS PRESENTED

1. Whether an unaccrued cause of action for personal injury is a form of property subject to protection under the due process clause of the Fourteenth Amendment to the United States Constitution, so as to prevent a state from terminating a plaintiff's right to assert a cause of action, by imposition of a statute of repose, at a time before which the plaintiff could not reasonably have known of the existence of that cause of action.

2. Whether a ten year statute of repose comports with the requirements of the equal protection clause of the Fourteenth Amendment to the United States Constitution, when that statute as applied absolutely bars petitioner and others similarly situated from asserting a cause of action due to the nature of the instrumentality which is the proximate cause of the injury complained of.

LIST OF PARTIES

The plaintiff-appellant in this case is Janet E. Pitts, Individually and as Administratrix of the Estate of Donald E. Pitts, deceased. The defendants-appellees in this case are GAF Corporation, Armstrong World Industries, Inc., Nicolet, Inc., Rock Wool Manufacturing Company, Inc., and Forty-Eight Insulation Company.

Title 28 U.S.C. §2403(b) may apply. No court below has certified to the Indiana Attorney General the fact that the constitutionality of the Indiana Statute was drawn into question.

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No.

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UNARCO INDUSTRIES, INC., *et al.*,
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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit

Petitioner, Janet E. Pitts, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on July 11, 1983.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 712 F.2d 276 (1983) and appears in the Appendix. The Opinions of the District Court for the Southern District of Indiana are unreported and appear in the Appendix.

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Circuit was entered on July 11, 1983. This Petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Indiana Code §33-1-1.5-5:

> This section applies to all persons regardless of minority or legal disability. Notwithstanding I.C. 34-1-2-5, any product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrued more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

Amendment XIV, §1, United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 14, 1981, Janet E. Pitts, individually and as Administratrix of the Estate of Donald E. Pitts, deceased, filed a product liability action against respondents and other manufacturers of asbestos-containing prod-

ucts. The Complaint alleged that the respondents had failed to warn petitioner's decedent, Donald E. Pitts, of the dangers inherent in the use of respondents' asbestos-containing products, products to which he had been exposed during his 30-year career as an asbestos insulation mechanic. As a result of his exposure to respondents' products, petitioner alleged that her decedent developed the asbestos-related disease of bronchogenic carcinoma (lung cancer) and died on April 4, 1980. The Complaint articulated claims for both wrongful death and loss of consortium, grounded on strict liability, negligence, implied warranty and conspiracy theories of liability. Petitioner sought both compensatory and punitive damages. Jurisdiction was founded upon Title 28 U.S.C. §1332.

As a result of certain pretrial rulings, the petitioner was left with a cause of action in wrongful death against respondents, predicated upon negligence and strict liability in tort. On May 27, 1982, respondent, Fibreboard Corporation, filed a motion for partial summary judgment on behalf of all defendants. On the same day respondent, Rock Wool Manufacturing Company, Inc., filed a similar motion for partial summary judgment. Both motions were predicated on the Indiana Product Liability Act's ten year "statute of repose", set forth in Indiana Code §33-1-1.5-5.

Asbestos, the inhalation of which by petitioner's decedent was the proximate cause of injury, is a mineral which has been used extensively in industrial and residential insulation. Since 1918, a substantial body of knowledge has been developed concerning the hazards involved in exposure to asbestos fibers. As early as 1934, it was known that the latency period, the period between inhalation and the development of disease symptoms, was prolonged and varied from ten to thirty years. It is also known generally in the medical and scientific community

that exposure to asbestos-containing dusts is the cause of asbestosis and mesothelioma (a rare cancer of the lining of either the pleura or the peritoneum). Further, since the mid-1940's there has been a substantial body of knowledge which links asbestos exposure and cigarette smoking to the development of bronchogenic carcinoma. Despite the existence of and the respondents' awareness of this body of knowledge, no warning regarding any hazard involved with exposure to asbestos was placed on asbestos-containing insulation products until the mid-1960's.

Medical and scientific knowledge, evolving over the past fifty years, has ratified the early finding that there is a prolonged period between initial exposure to asbestos and the development of any disease processes which are discoverable by an individual.

No research to date has found asbestos fibers to be less toxic with age. Asbestos, being a mineral, does not degrade with the passage of time, and as a result, asbestos-containing insulation which was placed into service 30, 40, or even 50 years ago has the same toxic propensity today as it had when it was originally placed into service.

Disregarding the available medical and scientific information and without providing petitioner an opportunity to oppose respondents' motions, the Trial Court granted the motions on June 1, 1982. Petitioner's counsel filed a motion for reconsideration and brief in opposition, which motions were subsequently overruled.

Based upon the June 1, 1982 order, the Trial Court granted appellees' motions for complete summary judgment. The Trial Court concluded that Donald E. Pitts was not exposed to an asbestos-containing product delivered by respondents to an initial user or consumer after December 14, 1971, and therefore, that petitioner's claims were barred by the Indiana Product Liability ten year statute of repose.

Subsequently, a timely appeal was perfected to the United States Court of Appeals for the Seventh Circuit. In its decision dated July 11, 1983, the Seventh Circuit Court of Appeals affirmed the Trial Court ruling.

REASONS FOR GRANTING A WRIT

To bar the petitioner and others from asserting a cause of action before the cause of action could have accrued, as is permitted by the decision below, is irrational and arbitrary and violative of her due process and equal protection rights under the Fourteenth Amendment to the United States Constitution.

The products liability law of the State of Indiana contains both a statute of limitations and a statute of repose. The statute of repose bars the filing of suit where a defective product was sold to a user or consumer more than ten years before the date of accrual of the cause of action. I.C. §33-1-1.5-5.

Due process requires that petitioner be given a meaningful hearing at a meaningful time. *Armstrong v. Manzo*, 380 U.S. 545 (1965). A cause of action has been deemed not to accrue until the plaintiff is "armed with all the facts." *United States v. Kubrick*, 444 U.S. 111 (1981). Once the cause of action has accrued, this Court has found a species of property to exist which is not susceptible to denial without due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

By erroneously treating the statute of repose as a statute of limitations, the court of appeals found that the petitioner had no property interest in a yet-unaccrued cause of action, relying on the *dicta* of *Silver v. Silver*,

280 U.S. 117 (1929). However, in light of *Logan* and *Kubrick*, petitioner asserts that she cannot be deprived of the inchoate property interest, implicitly recognized by those decisions, purely through legislative fiat. Particularly when that fiat is unreasonable, arbitrary, and serves no legitimate State interest.

The petitioner's position comports fully with prior holdings of this Court. Eighty-one years ago, this Court held that a statute of limitations must provide a party a full opportunity to present his claim in court. *Wilson v. Iseminger*, 185 U.S. 55 (1902). This Court stated that a statute of limitations would be unlawful if it attempted to extinguish rights arbitrarily, whatever the purpose of its provisions. A statute of limitations must provide a reasonable time "for the commencement of an action before the bar takes effect" *Terry v. Anderson*, 95 U.S. 628 (1877); *United States v. Morena*, 245 U.S. 392 (1918).

If the State's interest in a statute of limitations is primarily barring the assertion of stale claims, then the State must articulate some reasonable basis for a statute of repose which bars even the accrual of a cause of action. A statute of limitations is predicated upon dilatory activity or inactivity on the part of a prospective plaintiff; the statute of repose in the Indiana Products Liability statute relies upon serendipity. The nature of the product, and not the fact of injury, determines whether or not petitioner's cause of action will be allowed to accrue. This is in direct contravention to the holdings of this Court. It is unreasonable in barring, because of the lapse of time prior to their accrual, the rights to a cause of action when those rights could not have been exercised. *Lamb v. Powder River Livestock Co.*, 132 F. 434 (8th Cir. 1904).

The United States Court of Appeals for the Seventh Circuit held that there is a legitimate State interest in creating various sub-classes of tort plaintiffs, based upon whether their cause of action is one in negligence or product liability, and whether the instrumentality causing injury in a products liability suit was first sold more than ten years from the date the cause of action accrued. The State interest cited by the Court was one of reducing the risk to manufacturers when they place a product in the stream of commerce.

The first question to be addressed is whether the relief of manufacturers of defective products is a legitimate State interest. What possible interest could the State have in siding with culpable defendants and imposing upon an injured innocent plaintiff the burden of his injury? *Sindell v. Abbott Laboratories*, 163 Cal. Rptr. 132 (1980). The interest articulated by the Seventh Circuit is clearly illegitimate and any lines drawn pursuant to that illegitimate interest ought to be stricken.

Assuming however that the State interest is to alleviate manufacturers from liability on machines which have caused injury after their useful life, then the Legislature has elected an impermissible means of affecting that end.

The line drawn by the Indiana Legislature must bear some rational relationship to the legitimate State interest. *City of New Orleans v. Duke*, 427 U.S. 297 (1976). There is no rational relationship here. While machines may have useful lives and may wear out in use, a toxic mineral, such as asbestos, does not become less toxic with the passage of time. Therefore, the ten year statute of repose unconstitutionally deprives the petitioner of her cause of action by placing her in a sub-class of product liability plaintiffs, which class is not based upon any reasonable, rational relationship to a legitimate State interest.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the Judgment and Opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Decided July 11, 1983)

No. 82-2071

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JANET E. PITTS,
Plaintiff-Appellant,

v.

UNARCO INDUSTRIES, INC., *et al.*,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA,
INDIANAPOLIS DIVISION
No. 81 C 1334—CALE J. HOLDER, JUDGE

Before CUMMINGS, *Chief Judge,* COFFEY, *Circuit Judge,* and ASPEN, *District Judge.**

CUMMINGS, *Chief Judge.* The principal issues in this appeal are whether plaintiff was denied a fair opportunity to oppose defendants' motions for summary judgment and whether an unaccrued cause of action for wrongful death is a species of property protected by the Fourteenth

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*The Honorable Marvin E. Aspen, District Judge of the Northern District of Illinois, is sitting by designation.

Amendment and abrogated by the applicability of a ten-year Indiana statute of limitations.

Some 20 months following the death of her husband from lung disease, plaintiff, a resident of Indiana, commenced this wrongful death diversity action against 16 corporations, all residents of other states. Plaintiff alleged that each did business in Indiana and was involved at some stage in the production and distribution in Indiana of products containing asbestos. Plaintiff's husband had been an asbestos insulation mechanic during the years 1950 through 1979 and she claimed that asbestos-containing products produced and distributed by defendants caused his death. She sought $1,500,000 in compensatory damages and $1,000,000 in punitive damages. Her complaint was in five counts: Count I charged negligence; Count II, strict liability; Count III, breach of implied warranties of merchantability and fitness; Count IV, conspiracy to keep from the public information about the health risks associated with asbestos; and Count V charged loss of consortium. Plaintiff abandoned Count V and on May 13, 1982, the trial court dismissed with prejudice Counts III and IV for failure to state a claim for relief, and struck from the complaint plaintiff's prayer for punitive damages. This appeal does not question these rulings. But on June 9th, the court granted final summary judgment in favor of six defendants on Counts I and II.[1] This appeal is from that summary judgment.

I

Plaintiff first claims that she did not have an adequate opportunity to oppose the remaining six defendants' summary judgment motions. On June 1st before granting

1. A seventh defendant had been dismissed for want of service and the other nine settled with plaintiff.

those motions, the trial court ruled that the ten-year statute of limitations in Indiana's Product Liability Act, Ind. Code § 33-1-1.5-5 (1981),[2] applied to plaintiff's wrongful death suit, and that under that statute unless it appeared that each defendant had delivered an asbestos-containing product to plaintiff's husband or his employer within the ten-year period preceding the date plaintiff filed suit, her claim against that defendant would be time-barred. When the trial court issued this ruling, plaintiff had yet to present her argument about which statute of limitations should apply, and she claims that she was entitled to an opportunity to do so. But the ruling was not a judgment of any sort; it was simply a preliminary statement of the court's understanding of the law after having read several defense motions and supporting memoranda that had been filed five days earlier. Plaintiff had ample opportunity to respond to those motions and to challenge the court's understanding of the law and did so by filing a motion to reconsider on June 3 and two supporting briefs and affidavits on June 4 and 7. On June 7 and 8 the court considered the respective submissions and oral arguments of the parties in open court (plaintiff's App. 231-236; defendants' App. 89-92) before determining whether any defendants had delivered asbestos-containing products during the 10 years preceding

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2. Indiana Code § 33-1-1.5-5 (Burns IC 34-4-20A-5) provides:

33-1-1.5-5 Statute of limitations

Sec. 5. Statute of Limitations. This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-1-2-5, any product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

the commencement of this suit and whether the ten-year statute of limitations barred suit. Plaintiff thus fully responded to defendants' motions—by filing affidavits and two briefs challenging, on constitutional and choice-of-law grounds, the applicability of the ten-year statute of limitations. Plaintiff had further opportunity to pursue those arguments during the June 7 and 8 hearings.

While plaintiff's motion to reconsider mentioned Local Rule 10 of the Southern District of Indiana providing 15 days to file opposition to a summary judgment motion, she merely requested

> "an opportunity to present a response to the motion for partial summary judgment and further, for an opportunity to present in open court argument and testimony regarding the issues raised in the motions for partial summary judgment filed on behalf of all defendants in this matter." (Defendants' App. 86.)

Since she was accorded that opportunity, no reversible error was committed in receiving her affidavits and briefs on June 4 and 7 and considering her submissions and oral argument on June 7 and 8 before granting the summary judgment motions on June 9.

II

Second, plaintiff contends that the ten-year statute of limitations was tolled by defendants' fraudulent concealment of their tortious conduct. This contention was not advanced below and therefore need not be considered for the first time on appeal. *Ohio Casualty Insurance Co. v. R.J. Rynearson*, 507 F.2d 573 (7th Cir. 1974). Nevertheless, plaintiff argues in her reply brief that Count IV of the complaint contains an allegation of fraudulent concealment, but that Count was dismissed with prejudice

on May 13, almost four weeks before summary judgment was granted, and plaintiff has not challenged that dismissal on this appeal. In any event, the allegations in Count IV are insufficient to charge defendants with fraudulent concealment.[3]

Rule 9(b) of the Federal Civil Rules requires that fraud be pleaded with particularity. The only particular conduct charged in Count IV is that defendants withheld information from the public. Passive silence, however, is insufficient to trigger the fraudulent concealment doctrine. *Morgan v. Koch*, 419 F.2d 993, 998-999 (7th Cir. 1969); *French v. Hickman Moving & Storage*, 400 N.E.2d 1384 (Ind. App. 1980).

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3. Paragraph 37 of conspiracy Count IV realleges paragraphs 1 through 36 of the complaint, but plaintiff does not assert that any of those paragraphs raised fraudulent concealment. The remainder of Count IV is as follows:

> 38. Defendants, collectively and individually, have possessed since at least 1929 medical and scientific data which clearly indicated that asbestos-containing products were hazardous to the health and safety of plaintiff's decedent, Donald E. Pitts, and others exposed to asbestos-containing products.
>
> 39. Defendants, collectively and individually, knew or reasonably should have anticipated that plaintiff's decedent, Donald E. Pitts, and others in his position would be exposed to the asbestos-containing products produced by the defendants.
>
> 40. Defendants, prompted by pecuniary motives, collectively and individually, ignored and failed to act upon said medical and scientific data and conspired to deprive the public, and in particular the users of asbestos-containing products and their families of this information, thereby denying plaintiff's decedent, Donald E. Pitts, and others exposed to asbestos-containing products of the opportunity of free choice as to whether to be exposed to the asbestos-containing products produced by the defendants.
>
> 41. Defendants' conduct complained of above directly and proximately caused the plaintiff's decedent's injuries and death.
>
> 42. By reason of the premises, defendants are liable, jointly and severally, to the plaintiff for the injuries and damages described above. (Plaintiff's App. 49-50.)

III

Plaintiff's third claim is that the ten-year statute of limitations in the Product Liability Act is unconstitutional as applied to her because it deprives her of property without due process of law. An accrued cause of action is a right of property protected by the Fourteenth Amendment, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422; an unaccrued cause of action is not. *Silver v. Silver*, 280 U.S. 117, 122; *Munn v. Illinois*, 94 U.S. 113, 134; *Martin v. Pittsburg & L.E.R. Co.*, 203 U.S. 284, 295; *Ducharme v. Merrill-National Laboratories*, 574 F.2d 1307 (5th Cir. 1978), certiorari denied, 439 U.S. 1002; *Carr v. United States*, 422 F.2d 1007 (4th Cir. 1970). The Indiana legislature could, if it wanted, do away entirely with wrongful death actions beginning tomorrow even though there are probably some persons with living spouses who hope that the wrongful death statute, Ind. Code § 34-1-1-2 (1981), remains on the books in case their spouses are ever killed because of someone else's negligence. Such a hope is protected by the voting booth, not by the federal courts. *Munn v. Illinois*, 94 U.S. 113, 134. Plaintiff's cause of action had not yet accrued when the Indiana legislature adopted the ten-year statute of limitations contained in the Product Liability Act. Her right to sue for her husband's wrongful death vested when her husband died, *Fisk v. United States*, 657 F.2d 167 (7th Cir. 1981); *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981), and he died some two years after the Product Liability Act was passed. The change in the law therefore caused her no loss of property.

Even if she had a property right in this unaccrued cause of action, we cannot accept plaintiff's argument that the Indiana Product Liability Act's ten-year statute of repose violates due process under the federal and

Indiana Constitutions. An identical argument was rejected by the Indiana Supreme Court in another asbestos case (after the briefing herein) as to the three-year limitations contained in the Indiana Occupational Diseases Act. *Bunker v. National Gypsum Company*, 441 N.E.2d 8 (1982). In *United States v. Kubrick*, 444 U.S. 111, 117, the constitutionality of a two-year federal statute of limitations was assumed for the following reasons:

> Statutes of limitations which "are found and approved in all systems of enlightened jurisprudence," *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. *United States v. Marion*, 404 U.S. 307, 322, n.14 (1971); *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1965); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *Missouri, K. & T. R. Co. v. Harriman*, 227 U.S. 657, 672 (1913); *Bell v. Morrison*, 1 Pet. 351, 360 (1828).
>
> Section 2401(b), the limitations provision involved here, is the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat

its obvious purpose, which is to encourage the prompt presentation of claims. *Campbell v. Haverhill*, 155 U.S. 610, 617 (1895); *Bell v. Morrison, supra*, at 360. We should regard the plea of limitations as a "meritorious defense, in itself serving a public interest." *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136 (1938).

In *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, a Minnesota six-year statute of limitations was sustained over charges that it violated the due process and equal protection clauses of the Fourteenth Amendment.

The above examples are sufficient to persuade us that plaintiff's due process argument must be rejected.

IV

Plaintiff's final claim is that applying to her suit the ten-year limitations statute denies her "the equal protection of the laws" guaranteed by the Fourteenth Amendment. The ten-year limitations rule creates two classes of people: those injured by products more than ten years old and those injured by products less than ten years old. Those in the first class are prevented from bringing suit upon the same causes of action that those in the second class can bring. The effect of this is to lessen the risk of loss—*i.e.*, from having to pay for injuries resulting from use of a defective product—manufacturers face when they place a product into the stream of commerce. That is a legitimate legislative purpose, and it is not the courts' business to instruct the Indiana legislature when it is better for consumers than producers to bear that risk. See *Simpson v. United States*, 652 F.2d 831, 833-834 (9th Cir. 1981); *DiAntonio v. Northampton-Accomack Memorial Hospital*, 628 F.2d 287, 291 (4th Cir. 1980).

In *Bunker v. National Gypsum Company, supra,* also involving an asbestos-related disease, the Indiana Supreme Court rejected an equal protection clause argument similar to plaintiff's.[4] And the Supreme Court of the United States did likewise in a related setting in *Chase Securities Corp., supra.*

Since the privileges and immunities clause in Article I, Section 23 of the Indiana Constitution affords plaintiff the same protection as does the Fourteenth Amendment Equal Protection Clause, *Huff v. White Motor Corp.,* 609 F.2d 286, 298 (7th Cir. 1979); *Haas v. South Bend Community School Corp.,* 289 N.E.2d 495 (Ind. 1972), we reject for the same reasons plaintiff's claim under that provision. And again *Bunker, supra,* is on point because there the three-year statute of limitations in the Indiana Occupational Diseases Act was held "to be constitutional in all respects" (441 N.E.2d 14) even though dissenting Justice Hunter thought its application would "defy * * * the privileges and immunities guaranteed our citizens * * *" (441 N.E.2d 18).

Pitts was not left without recourse by this statute of limitations. Since nine defendants could not take advantage of the statute, they were not immunized and indeed settled with plaintiff (note 1 *supra*), thus vitiating Pitts' claim that the statute contravened the Indiana privileges and immunities clause by conferring blanket immunity to all asbestos producers. Instead the statute must be sustained as reflecting the legislative twin goals of (a) repose and (b) reliance that stale claims will not be tolerated in view of loss of memories, witnesses or evidence.

Judgment affirmed.

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4. See also *Johnson v. St. Vincent Hospital, Inc.,* 404 N.E.2d 585 (Ind. Sup. Ct. 1980).

ENTRY OF RULING ON LIMITATION OF ACTIONS OF THE UNITED STATES DISTRICT COURT

(Dated June 1, 1982)

No. IP 81-1334-C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JANET E. PITTS, Individually, *et al.*,

v.

JOHNS-MANVILLE SALES CORPORATION,
a Delaware Corporation, *et al.*

ENTRY OF RULING ON LIMITATION OF ACTIONS

The defendants have presented the issue of the statute of limitations in various ways and the Court being advised in the matter does now file its ruling.

Donald E. Pitts died April 4, 1980 and the claim of Jane E. Pitts, as administratrix of the estate of Donald E. Pitts, deceased, as alleged in counts one and two of the complaint accrued under the Indiana Wrongful Death Statute on April 4, 1980. IC 34-1-1-2 (Burns). Both counts one (tortious negligence) and two (tortious strict liability) of the complaint are based upon tortious product liability claims and are governed by Burns IC 34-4-20A-1 through 34-4-20A-8(b) which statute includes a section on limitation of actions. Burns IC 34-4-20A-5.

Counts one and two of the complaint alleged that the decedent was employed as an asbestos insulation mechanic from approximately 1950 through 1979; and that he was

exposed during this time to asbestos, asbestos dust, and asbestos fibers which he inhaled and ingested from defendants' asbestos-containing products which proximately caused him to develop an asbestos related disease of lung cancer that caused his death. The complaint is not specific as to when the products of each of the defendants were manufactured, sold, or delivered and used by Mr. Pitts during the period 1950 through 1979. Such facts must be developed in trial.

It is therefore ADJUDGED, by way of ruling on all pending motions raising such limitation of action issues and also by way of advance ruling on the issue where it is raised by affirmative defenses of answer, or by way of motions of all defendants, that the plaintiff's, Janet E. Pitts, as administratrix, actions alleged in counts one and two of the complaint are BARRED as to that claim or claims or part of a claim or claims against a defendant or defendants that is based upon the alleged asbestos products of a defendant or defendants that was or initially were delivered to Mr. Pitts or his employer more than ten (10) years before December 14, 1981, when this action was commenced.

Count five of the complaint is two actions by Janet E. Pitts, individually for loss of consortium of the decedent prior to the date of his death on April 4, 1980. The actions are based upon the same facts and theories of counts one (tortious negligence) and two (tortious strict liability) of the counts. The actions in count five are subject to the limitations of action provisions of the Indiana Products Liability, Burns IC 34-4-20A-5, providing her causes of action did not accrue before June 1, 1978, the effective date of the action, as Burns 34-4-20A-8(b) provides that the act *"does not apply to a cause of action that accrues before June 1, 1978"*.

It is therefore ADJUDGED, by way of ruling on all pending motions raising a limitation of action issue and also by way of advance ruling on the issue where it is raised by affirmative defenses of answer, or by way of motions, of all defendants, that the plaintiff, Janet E. Pitts, as an individual, alleged in her actions in count five of the complaint are BARRED as to that claim or claims or part of a claim or claims against a defendant or defendants that accrued to her since June 1, 1978 and and more that [sic] two years prior to commencement of this action on December 14, 1981. Burns IC 34-4-20A-5 and IC 34-4-20A-8(b); and is also BARRED if the alleged asbestos products of a defendant or defendants that was or were initially delivered to Mr. Pitts or his employer was more than ten (10) years before December 14, 1981, when her actions were commenced, Burns IC 34-4-20A-5; and is also BARRED if plaintiff's actions were commenced on December 14, 1981 and was more than two years from the accrual of her actions which accrual occurred more than eight (8) years but less than ten (10) years from the date the alleged asbestos products of a defendant or defendants that was initially delivered to Mr. Pitts or his employer and such accrual date of Mrs. Pitts' action was after June 1, 1978, the effective date of the Indiana Products Liability Act, Burns IC 34-4-20A-5 and 34-4-20A-8(b).

If the actions of Mrs. Pitts accrued prior to June 1, 1978, the effective date of the Products Liability Act, then the Indiana general limitation of actions statute of two years governs. Burns IC 34-1-2-2 and Burns IC 34-4-20A-8(a)(b). It is then ADJUDGED that if Mrs. Pitts commenced her actions in count five of the complaint on December 14, 1981 and such commencement was more than two (2) years after the accrual of her action which accruals occurred prior to June 1, 1978 then such actions

would be and are BARRED. Burns IC 34-1-2-2 and Burns IC 34-4-20-8(a)(b).

The defendants are reminded that the statute of limitation defenses must be affirmatively pleaded under the Federal Rules of Civil Procedure and the Court's advance ruling does not waive that requirement.

Dated this 1 day of June, 1982.

/s/ CALE J. HOLDER
Judge, United States District Court Southern District of Indiana

JUDGMENT OF THE UNITED STATES DISTRICT COURT

(Dated June 9, 1982)

Cause No. IP 81-1334C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JANET E. PITTS, Admin., *et al.*,
Plaintiffs,

vs.

JOHNS-MANVILLE SALES CORP., *et al.*,
Defendant.

JUDGMENT

This cause came on to be heard on the motions of the defendants, Unarco Industries, Inc., Rock Wool Manufacturing Company, Inc., Forty-Eight Insulations, Inc.,

GAF Corporation, Nicolet, Incorporated, and Armstrong Cork Company for summary judgment pursuant to Trial Rule 56, Federal Rules of Civil Procedure, and the Court having considered the respective submissions and oral arguments of the parties in open court on June 8, 1982, and having found that there is no genuine issue of material fact, and having concluded that defendants are entitled to judgment as a matter of law, it is hereby ORDERED, ADJUDGED and DECREED that defendants' motions for summary judgment be granted, and it is further

ORDERED, ADJUDGED and DECREED that there is no just reason for delay and that final judgment is entered in favor of defendants, Unarco Industries, Inc., Rock Wool Manufacturing Company, Inc., Forty-Eight Insulations, Inc. GAF Corporation, Nicolet Incorporated, and Armstrong Cork Company, and against the plaintiff on Count I and Count II of the complaint.

Dated this 9 day of June, 1982.

/s/ CALE J. HOLDER

Judge, United States District Court for the Southern District of Indiana

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT

(Dated June 9, 1982)

Cause No. IP 81-1334C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JANET E. PITTS, Admin., *et al.*,
Plaintiffs,

vs.

JOHNS-MANVILLE SALES CORP., *et al.*,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court on Defendants, Unarco Industries, Inc., Rock Wool Manufacturing Company, Inc., Forty-Eight Insulations, Inc., GAF Corporation, Nicolet, Incorporated, and Armstrong Cork Company, Motions for Summary Judgment. The Court, being duly advised in the premises and having considered the respective submissions and arguments of the parties in open court on June 8, 1982, hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The following facts are undisputed:

1. Janet E. Pitts, administratrix of the estate of Donald Pitts, filed the Complaint herein on December 14, 1981, of which two counts remain, tortious negligence

and strict liability, alleging that Donald Pitt's [sic] death on April 4, 1980, was caused by his exposure to asbestos-containing products manufactured by various defendants.

2. Donald Pitts worked as an asbestos insulation worker for approximately thirty (30) years.

3. Defendant Unarco Industries, Inc. is incorporated under the laws of the State of Delaware and has its principal place of business in the State of Illinois; defendant Rock Wool Manufacturing Company, Inc. is incorporated under the laws of the State of Alabama and has its principal place of business in the State of Alabama; defendant Forty-Eight Insulations, Inc., is incorporated under the laws of the State of Illinois and has its principal place of business in the State of Illinois; defendant GAF Corporation is incorporated under the laws of the State of Delaware and has its principal place of business in the State of New York; defendant Nicolet, Incorporated in [sic] incorporated under the laws of the State of Delaware and has its principal place of business in the State of Pennsylvania; and Armstrong Cork Company is incorporated under the laws of the State of Pennsylvania and has its principal place of business in Pennsylvania.

4. The decedent, Donald Pitts, was a resident of the State of Indiana at the time of his death, residing within the jurisdictional boundaries of the United States District Court for the Southern District of Indiana.

5. Plaintiff's decedent, Donald E. Pitts, was not exposed to any asbestos-containing products delivered by Unarco Industries, Inc., Rock Wool Manufacturing Company, Inc., Forty-Eight Insulations, Inc., GAF Corporation, Nicolet, Incorporated, or Armstrong Cork Company, respectively to an initial user or consumer after December 14, 1971.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over all parties in this matter. Furthermore, this Court has jurisdiction over the subject matter of this cause of action. 28 U.S.C. Section 1332 (1976).

2. The law applied in this case was the law of the forum, the State of Indiana. *Greeno v. Clark Equipment Co.*, 237 F. Supp. 427 (N.D. Ind. 1965).

3. Plaintiff's claims against the defendants, Unarco Industries, Inc., Rock Wool Manufacturing Company, Inc., Forty-Eight Insulations, Inc., GAF Corporation, Nicolet, Incorporated, and Armstrong Cork Company, under either tortious negligence or strict liability are barred by the ten (10) year statute of limitations of the Indiana Product Liability Act. IND. CODE Section 33-1-1.5-5 (BURNS Section 34-4-20A-5).

4. Defendants' Motions for Summary Judgment will be granted and final judgment will be entered in this case in favor of Unarco Industries, Inc., Rock Wool Manufacturing Company, Inc., Forty-Eight Insulations, Inc., GAF Corporation, Nicolet, Incorporated, and Armstrong Cork Company, in accordance with these findings of fact and conclusions of law, and pursuant to Rules 54(b) and 56 of the Federal Rules of Civil Procedure. The Court further concludes that there is no just reason for delay in entering judgment in this case.

Judgment will be entered accordingly, and Counts I and II of plaintiff's complaint will be dismissed as against these defendants.

DATED: June 9, 1982.

/s/ CALE J. HOLDER

Judge, United States District Court for the Southern District of Indiana

JUDGMENT ENTRY OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Dated July 11, 1983)

No. 82-2071

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JANET E. PITTS,
Plaintiff-Appellant,

vs.

UNARCO INDUSTRIES, INC., *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana,
Indianapolis Division.
No. 81 C 1334
Judge Cale J. Holder

JUDGMENT—ORAL ARGUMENT

Before HON. WALTER J. CUMMINGS, *Chief Judge;* HON. JOHN L. COFFEY, *Circuit Judge;* HON. MARVIN E. ASPEN, *District Judge.**

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

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*The Honorable Marvin E. Aspen, District Judge of the Northern District of Illinois, is sitting by designation.

No. 83-594

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JANET E. PITTS, Administratrix, etc.,
Petitioner,

vs.

UNARCO INDUSTRIES, INC., et al.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Petition for Writ of Certiorari should be denied because Petitioner has failed to present any special or important reasons for granting such review in light of the facts that (1) the decision of the Seventh Circuit of which review is sought is not only consistent with, but compelled by, prior decisions of this Court rejecting due process and equal protection challenges, such as Petitioner here makes, to a State statute of limitations, or other rule of tort law, which rationally achieves legitimate State interests, as does Indiana's here, and (2) this Court has previously dismissed appeals in which a plaintiff-appellant contended, as does Petitioner here, that the barring of his or her State claim for compensation for an alleged asbestos-related disease by a State statute of limitations violated federal due process and equal protection guarantees.

LIST OF PARTIES

Pursuant to Supreme Court Rule 28.1 Respondents state that the parties to this proceeding are:

Janet E. Pitts, Administratrix, etc.,

Petitioner,

vs.

Unarco Industries, Inc.,
GAF Corporation,
Armstrong World Industries, Inc.,
Rock Wool Corporation,
Nicolet, Inc., and
Forty-Eight Insulations, Inc.

Respondents.

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In The

Supreme Court of the United States

October Term, 1983

JANET E. PITTS, Administratrix, etc.,
Petitioner,

vs.

UNARCO INDUSTRIES, INC., et al.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The Opinion of the Court of Appeals [Petition for a Writ of Certiorari ("Petition"), Appendix pp. A1-A9] is reported at 712 F.2d 276 (1983). The Opinion and Order of the District Court (Petition, pp. A10-A17) is not reported.

JURISDICTION

Respondents adopt the jurisdictional statement of Petitioner (Petition, p. 1).

STATEMENT OF THE CASE

Petitioner's "Statement of the Case" is argumentative and generally unsupported by the Record, especially the third through sixth paragraphs. Therefore, Respondents respectfully offer the following proper Statement of the Case.

On December 14, 1981, approximately 20 months following the death of her husband, Janet E. Pitts, individually and as Administratrix of the Estate of Donald E. Pitts, deceased, filed a five-count Complaint against Respondents. The Complaint alleged that Petitioner's husband died from exposure to asbestos-containing products, distributed in Indiana by Respondents, during his approximately 30-year career as an asbestos insulation mechanic. Jurisdiction was based upon diversity of citizenship and liability was alleged upon the following theories: Count I—negligence; Count II—strict liability; Count III—breach of implied warranties of merchantability and fitness; Count IV—conspiracy to withhold asbestos-related health risks from the public; Count V—loss of consortium. The Complaint prayed for compensatory and punitive damages.

Counts III, IV, V and the prayer for punitive damages were disposed of at the trial court level through abandonment by Petitioner and various pre-trial rulings. Respondents moved for Summary Judgment on Counts I and II based on the ten-year Indiana products liability statute of limitations contained in IC 33-1-1.5-5. After lengthy arguments, stipulations and submissions of evidence in open court, during which time Petitioner was afforded ample opportunity and did present arguments and evidence in opposition, the Respondents' Motions were granted.

The granting of the Motions was based upon the Trial Court's finding that Donald E. Pitts was not exposed to any asbestos-containing products delivered by Respondents to an initial consumer or user within the ten years prior to the filing of Petitioner's Complaint. (Petition, pp. A16-A17).

Subsequently, the ruling of the Trial Court was affirmed by the United States Court of Appeals for the Seventh Circuit in its decision dated July 11, 1983. (Petition, pp. A1-A9).

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari should be denied because it presents no special or important reasons for review by this Court. The decision of the Seventh Circuit is not only consistent with, but is compelled by, prior decisions of this Court rejecting due process and equal protection challenges, such as Petitioner here makes, to a State statute of limitations, or other rule of tort law, which rationally achieves legitimate State interests, as does Indiana's here.

Moreover, this Court has previously dismissed appeals in which a plaintiff-appellant contended, as does Petitioner here, that the barring of his or her State claim for compensation for an alleged asbestos-related disease by a State statute of limitations violated federal due process and equal protection guarantees.

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER HAS FAILED TO PRESENT ANY SPECIAL OR IMPORTANT REASONS FOR GRANTING SUCH REVIEW.

Rule 17.1 of this Court (28 U.S.C.A.: Rules, 1983 Pocket Part) provides as follows:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted *only* when there are *special* and *important reasons* therefor." (Emphasis supplied).

Petitioner clearly fails to meet this test because she has not presented any special or important reasons for this Court's review of the decision of the United States Court of Appeals for the Seventh Circuit of July 11, 1983, styled *Pitts v. Unarco Industries, Inc.*, 712 F.2d 276 (7th Cir. 1983) (Petition, pp. A1-A9).

In Rule 17.1, this Court set forth three types of situations in which "the character of reasons" presented by the Petition may be considered to be sufficiently "special and important" to justify review. Petitioner fails to indicate which of the three types of reasons she contends justify review. Her failure to do so is clearly not inadvertent. She simply cannot do so. Certiorari should therefore be denied.

Petitioner cites no decision of a federal court of appeals which she claims is in conflict with the Seventh Circuit's *Pitts* decision. Nor can she cite any decision of the Indiana Supreme Court which she claims to be in conflict with *Pitts*. Nowhere in the Petition is there any suggestion that the Seventh Circuit "has so far departed from the

accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision." Supreme Court Rule 17.1(a). Petitioner thus fails to meet the tests outlined in Rule 17.1(a).

Petitioner also fails to bring her Petition within subparagraph (b) of Rule 17.1 inasmuch as the decision of which review is sought was rendered by the Seventh Circuit Court of Appeals, not the Indiana Supreme Court.

Review of this Court's decisions demonstrates Petitioner's inability to bring her Petition within subparagraph (c) of Rule 17.1. This Court's decisions show that the questions of federal law presented by the petition have been effectively "settled by this Court" and that the Seventh Circuit in *Pitts* decided such federal questions in a way *not* "in conflict with applicable decisions of this Court."

This Court has held that due process is not offended when Congress or a State legislature abolishes some unvested common law cause of action by statute. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978); *Silver v. Silver*, 280 U.S. 117, 122 (1929); *Munn v. Illinois*, 94 U.S. 113, 134 (1877).

As was held by the Court of Appeals below, Petitioner's "cause of action had not yet accrued when the Indiana legislature adopted the ten-year statute of limitations contained in the Product Liability Act." (Petition, p. A6).

Thus, the Court of Appeals was clearly correct in holding that such

> "an unaccrued cause of action is not a right of property protected by the Fourteenth Amendment. *Silver v. Silver*, 280 U.S. 117, 122; *Munn v. Illinois*, 94 U.S. 113, 134; *Martin v. Pittsburgh & L.E.R. Co.*, 203 U.S. 284, 295; *Ducharme v. Merrill-National Laboratories*,

574 F.2d 1307 (5th Cir. 1978), certiorari denied, 439 U.S. 1002; *Carr v. United States*, 422 F.2d 1007 (4th Cir. 1970)." (Petition, p. A6).

The fact that Petitioner had no cause of action when IC 33-1-1.5-5 was enacted, and therefore was not deprived of any property by that statute, is crucial because it makes totally misplaced her reliance on *Wilson v. Iseminger*, 185 U.S. 55 (1902), *Terry v. Anderson*, 95 U.S. 628 (1877), and *Lamb v. Powder River Livestock Co.*, 132 F. 434 (8th Cir. 1904), Petition, p. 6, and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (Petition, pp. 5-6).

In *Wilson v. Iseminger, supra*, an action in assumpsit for ground rents allegedly due for the years 1887 through 1896 on a deed dated January 4, 1854, was filed in a Pennsylvania State court in Philadelphia in December, 1896. Defendant's defense was based on a Pennsylvania statute which provided that where, as there, no demand had been made by the owner for such rent for over twenty-one years prior to the filing of a suit, a release thereof would be presumed and such rents thereafter would be irrecoverable.

This Court affirmed the trial court's rejection of plaintiff's argument that the statute was unconstitutional because it violated the federal constitutional prohibition against States passing a law impairing obligations of contracts (U.S. Const. Art. I, Sec. 10).

The *Wilson* Court upheld the statute by reasoning that it did not impair the right of contract because it did not destroy the ground rent obligation but instead removed the remedy for breach of that obligation. The Court held that there is no distinction between a claim for ground rent and a claim for any other debt, and because a statute of limitations on the latter was permissible, so was one

on the former. Clearly, neither the facts nor the result in *Wilson* are relevant here.

The *Wilson* Court was concerned with rights vested in the plaintiff under his deed to ground rents, i.e., rights vested by contract or statute, which are sought later to be removed by some statute of limitations:

> "But, assuming that there is nothing peculiar in ground rents that withdraw them from the reach of statutes of limitation, it is further contended, in the present case, that the Act of April 27, 1855, can have no valid application to a ground rent reserved before the passage of that statute. It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his rights in the courts. A statute could not bar *the existing rights* of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to *extinguish rights* arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon *existing causes of action*; though what should be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice. Cooley, Const. Lim. 451.
>
> Thus, in *Terry v. Anderson*, 95 U.S. 628, 24 L.Ed. 365, it was said per Chief Justice Waite:
>
> > 'This court has often decided that statutes of limitation affecting *existing rights* are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. * * *' " *Wilson v. Iseminger, supra*, 185 U.S. 62, 63 (citations omitted; emphasis added).

This is not a case like *Wilson v. Iseminger, supra,* or *Terry v. Anderson, supra,* in which vested rights were being tampered with:

> "[o]ur cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' * * * The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,' * * * despite the fact that 'otherwise settled exceptions' may be upset thereby. * * * " *Duke Power Co., supra,* 438 U.S. at 88 n.32 (citations omitted).

Accord, Silver v. Silver, supra; Munn v. Illinois, supra.

Lamb v. Powder River Livestock Co., supra, Petition, p. 6, is likewise inapposite. The Court was there concerned with a statute of limitations against actions on judgments which was enacted *after* the plaintiff had obtained his judgment against the defendant (which he was seeking to enforce in *Lamb*) and thus *after* his rights in and under that judgment had vested. *Id.*, 132 F. at 435.

Logan v. Zimmerman Brush Co., supra, Petition, pp. 5-6, is not in conflict with *Pitts.* There appellant Logan filed a complaint against his former employer Zimmerman Brush Company ("Zimmerman") with the Illinois Fair Employment Practices Commission (the "Commission") for alleged employment discrimination. Logan claimed that Zimmerman wrongfully fired him because of his physical handicap in violation of the Illinois State Fair Employment Practices Act ("FEPA" or the "Act").

Logan had complied with the Act by filing his complaint with the Commission within 180 days of the alleged illegal firing, but the Commission had failed to hold a fact-finding conference as required of it by FEPA within 120 days of the filing of Logan's complaint. When Zimmerman moved to dismiss Logan's complaint with the Com-

mission based on failure to timely hold the conference, the Commission denied Zimmerman's motion.

The Illinois Supreme Court held, in response to a writ filed with it by Zimmerman, that the Commission erred in denying Zimmerman's motion to dismiss because the failure of the Commission to timely hold its conference was jurisdictional. The Illinois Supreme Court then directed the Commission to dismiss Logan's administrative complaint against Zimmerman.

This Court reversed, holding that the Illinois Supreme Court had denied Logan the due process guaranteed him by the Fourteenth Amendment because its decision effectively denied him an opportunity for a hearing appropriate to the nature of his claim for alleged employment discrimination. *Logan, supra,* 102 S.Ct. at 1159.

This Court reasoned that plaintiff Logan's accrued FEPA claim for employment discrimination constituted a property right protected by federal due process. *Logan, supra,* 102 S.Ct. at 1154-56. So holding, the Court went on to hold that the Illinois Supreme Court deprived Logan of that property without a meaningful opportunity to be heard on the merits of his claim. *Logan, supra,* 102 S.Ct. at 156-59.

However, the *Logan* Court noted that a State can choose not to confer or create a property right at all by not granting to a potential plaintiff any cause of action at all. *Logan, supra,* 102 S.Ct. at 1156. Once the State does create a cause of action, it cannot authorize deprivation thereof without appropriate procedural due process safeguards.

However, the State may eliminate a statutory cause of action altogether, in which case the process due is the legislative process in so doing. *Logan, supra,* 102 S.Ct.

at 1156. This is exactly the Seventh Circuit's reasoning in *Pitts*:

> "The Indiana Legislature could, if it wanted, do away entirely with wrongful death actions beginning tomorrow even though there are probably some persons with living spouses who hope that the wrongful death statute, Ind. Code §34-1-1-2 (1981) remains on the books in case their spouses are ever killed because of someone else's negligence. Such a hope is protected by the voting booth, not by the federal courts. *Munn v. Illinois*, 94 U.S. 113, 134." *Pitts, supra*, Petition, p. A6.

What this Court held in *Logan* was that the State cannot deprive a person of his existing property interest in an accrued cause of action by not first giving that person an opportunity to present it. Here, however, as the Seventh Circuit held, plaintiff Janet Pitts did not have any property interest—any cause of action for the alleged wrongful death of her decedent—until Mr. Pitts died on April 4, 1980. Any interest which she would *then* have acquired would have been subject to the ten-year statute of limitations which was enacted effective on June 1, 1978, before she ever acquired her property right, that is, before her cause of action accrued. This clearly does not violate the Fourteenth Amendment: "the State remains free to create substantive defenses or immunities for use in adjudication . . . ." *Logan, supra*, 102 S.Ct. at 1156.

Thus, *Logan* is not on point. There, as in *Wilson v. Iseminger, supra*, the Court was concerned with an attempt by a State—in *Logan*, Illinois acting through its Supreme Court; in *Wilson*, Pennsylvania acting through its legislature—to cut off an existing property interest in an accrued cause of action. Here, in contrast, Petitioner had no existing property interest, because her cause of action had not accrued, when Indiana, acting through its legislature, passed IC 33-1-1.5-5.

This Court went on to hold in *Logan* that there was a deprivation of Logan's FEPA claim "in a random manner" because the State of Illinois had no appreciable interest in the requirement that the Commission hold a fact-finding conference within 120 days of the filing of the Complaint. *Logan, supra,* 102 S.Ct. at 1157.

In contrast, Indiana's interests in having a product liability action filed within ten years of the first sale of the allegedly defective product on which such action is based *are* substantial under the "legislative twin goals of (a) repose and (b) reliance that stale claims will not be tolerated in view of loss of memories, witnesses or evidence." *Pitts, supra,* Petition, p. A9. As the Seventh Circuit properly held, there can be no question that those twin legislative goals are reasonably served by the ten-year limitations period in IC 33-1-1.5-5.

Moreover, this Court in *Logan* reaffirmed its position as stated earlier in *Martinez v. California,* 444 U.S. 217, 282 (1980), " 'that the State's interest in fashioning its own rules of tort law is paramount to any discernable federal interest except perhaps an interest in protecting the individual citizen from State action that is wholly arbitrary or irrational.' " *Logan, supra,* 102 S.Ct. at 1156. There is clearly no wholly arbitrary or irrational state action in IC 33-1-1.5-5.

Comparison of this Court's 1982 *Logan* decision with its 1980 *Martinez* decision demonstrates why *Logan* is not in conflict with *Pitts.*

In *Martinez,* this Court affirmed a California State Court's dismissal, based on the California Tort Claim Act's provision of absolute tort immunity for the State's parole decisions, of a wrongful death claim brought against the State of California by the heirs of a decedent killed by

a parolee based on the alleged negligence of the State's employees in deciding to parole the eventual murderer. The plaintiffs-appellants argued that the California rule violated due process.

This Court in *Martinez* disagreed, upholding the statute because it rationally achieved California's purpose, enhancement of the State's parole program by eliminating any possible "chilling effect" of potential tort liability on the State Agents in the parole decision-making process. This Court so held even though the statute's bar was absolute, and that there was no right to bring any wrongful death, personal injury or property damage claim against the State of California for negligently paroling someone.

The contrast between *Logan* and *Martinez* makes clear why the Seventh Circuit's decision is not in conflict with any of this Court's decisions. In *Logan*, the alleged wrong as to which an absolute bar or immunity was created was for employment discrimination; in *Martinez* it was for personal injury or wrongful death caused by negligence. In *Logan*, the "immunity" was created for an employer who committed such discrimination if no fact-finding conference was held by the Commission within 120 days of the filing of the FEPA complaint. In *Martinez*, the "immunity" was created for the State for its negligence in paroling the actual perpetrator of the injury or death. The Illinois statute was struck down whereas the California statute was upheld.

Examination of this Court's opinions reveals that the different results were compelled because the Illinois statute operated in a random manner, whereas the California statute operated in a rational manner. The Illinois statute was held to operate in a random manner to achieve the apparent Illinois state purpose of forcing the Commission

to quickly develop a complete factual record on the alleged employment discrimination charge before disposing of the charge. In contrast, the California statute was held to operate in a rational manner to achieve the purpose of rehabilitation of criminals by enhancing the parole system.

Thus, under *Martinez*, federal equal protection is not offended by a State statute which creates even an absolute bar to an entire class of potential tort plaintiffs—there the class of persons allegedly injured by a negligently paroled California State prisoner; here, assertedly, the class of persons allegedly injured by products sold over ten years before suit—so long as such a statute rationally achieves a legitimate State purpose. Federal due process is offended by such a statute, under *Logan*, only if the statute operates "in a random manner" and the State interest is "insubstantial". *Logan, supra*, 102 S.Ct. at 1157.

Here neither test is met: IC 33-1-1.5-5 clearly operates in a rational manner to achieve the substantial Indiana interests in repose and reliance.

The Seventh Circuit was clearly correct in holding (*Pitts*, Petition, pp. A6-A9), that "low level" or rational-basis judicial scrutiny is the proper scope of judicial review of Petitioner's challenges to the ten-year product liability statute of limitations in IC 33-1-1.5-5 on Federal due process and equal protection grounds. *Duke Power Co. v. Carolina Environmental Study Group, Inc., supra*, 438 U.S. at 83, 88 n.32; *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955); *President and Directors of Georgetown College v. Madden*, 505 F.Supp. 557, 578 (D.C. Md. 1980) (citations omitted), *aff'd in part, appeal dismissed in part*, 660 F.2d 91 (4th Cir. 1981).

Two corollary principles thus applicable to Federal due process and equal protection analysis of IC 33-1-1.5-5 are

that such a "statutory discrimination will not be set aside if *any* set of facts reasonably may be conceived to justify it," *McGowan v. Maryland*, 366 U.S. 420, 421 (1961) (emphasis added), and that the party challenging a classification has a heavy burden "to negative *every* basis which might support it. . . ." *Lehnhausen v. Lakeshore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (emphasis added).

These principles of judicial restraint are particularly appropriate where, as here, a Federal court is asked to review State rules of tort law, such as a statute of limitation, against Federal constitutional provisions because

> "the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. California*, *supra*, 444 U.S. at 282.

As to a State statute of limitations, "[t]he theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that *the right to be free of stale claims in time comes to prevail over the right to prosecute them.*" *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974) (emphasis added). Such "linedrawing", that is, the determination of *when* that time comes, "is best left to either the [Indiana] legislature or the [Indiana] Supreme Court. * * *" *Neubauer v. Owens-Corning Fibreglas Corp.*, 686 F.2d 570, 574 n.2 (7th Cir. 1982) (citation omitted).

Thus,

> "The constitutional safeguard is offended only if the classification rests on grounds *wholly irrelevant* to the achievement of the State's objective." *McGowan v. Maryland*, *supra*, 366 U.S. at 426 n.3 (citations omitted; emphasis supplied).

Petitioner clearly cannot and does not demonstrate any such deficiency in IC 33-1-1.5-5.

One purpose of IC 33-2-2.5-5 and other statutes of limitation is the policy of "reliance," the goal of which is "to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. * * *" *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (citation omitted). Evidence as to stale claims is obviously unreliable and prejudicial to the defendant because as the years between injury and suit increase, so does the probability that the search for truth at trial will be impeded and contorted to the benefit of the plaintiff.

The second purpose of a statute of limitation is to effectuate the policy of "repose," which has been described as follows:

> "Second, entirely apart from the merits of particular claims, the interest in certainty and finality in the administration of our affairs, especially in commercial transactions, makes it desirable to terminate contingent liabilities at specific points in time." *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 611 (7th Cir. 1975).

As stated by this Court, the legitimate state goal of "repose" is to protect a citizen from psychological and economic uncertainty: to provide a point in time when a citizen can "be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations." *Chase Securities Corp. v. Donaldson, supra*, 325 U.S. at 314.

Indiana's determination that a ten-year statute of limitations achieves Indiana's goals of reliance and repose is clearly rational.

Common experience teaches that it does not take ten years between the first sale of a product and the litigation over its alleged defectiveness for memories of how that product was manufactured to "have faded," or for "witnesses" to its manufacture to "have died or disappeared," or for "evidence" of its production, marketing and delivery to have "been lost." *See Chase Securities Corp., supra.*

It is hardly unreasonable for persons or companies to be granted the right to "plan their affairs with a degree of certainty, free from the disruptive burden of protracted and unknown potential liability" for an allegedly defective product when over ten years have elapsed since the first sale of that product. *See Johnson v. Star Machinery Co.*, 530 P.2d 53, 56 (Ore. 1974).

Even Petitioner could not dispute that a defendant who is required to defend a claim that its allegedly defective product injured them is at a significant disadvantage "by reason of dimmed memories, the death of witnesses and lost documents" when the plaintiff's alleged use of that product occurred over ten years before he filed suit.

As noted above, a key principle of "rational-basis" limited review is that "a statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it." *McGowan v. Maryland, supra,* 366 U.S. at 421.

More than one set of facts can easily be conceived to justify the selection by the Indiana Legislature of ten years for the limitations period in IC 33-1-1.5-5. The precise length of the limitations period contained in any statute of limitations is, of course, somewhat arbitrary. *Chase Securities Corp., supra,* 325 U.S. at 314-15. In deciding where to draw the line between claims deemed

too old to be fairly entertained, in light of the statute's goal of reliance and repose, and those deemed not too old for those policy goals to be vitiated by their litigation, the legislature must face the difficult task of selecting a reasonable yardstick for drawing this line which achieves the goals sought "in light of the *broad class* of cases to which it applies. . . ." *Hargraves v. Brackett Stripping Machine Co.*, 317 F.Supp. 676, 683 (E.D. Tenn. 1970) (emphasis added).

The broad class of all product liability cases relevant under IC 33-1-1.5-5 includes cases based not only on asbestos-containing products and asbestos, but product cases involving automobiles, airplanes and virtually every other type of "product" imaginable.

The legislative judgment that most of the broad class of product cases which are filed over ten years after the product's first sale are not reliable subjects for litigation is hardly unreasonable.

The legislative determination that people and businesses need to be able to finally and with some reasonable degree of certainty write off contingent liabilities which are over ten years old in order to be able to reasonably plan their economic affairs is hardly capricious.

Petitioner cannot show otherwise. It is practically impossible to make such judgments applicable to "the broad class of cases" involving defective products with any reasonable degree of certainty without being able to resort to extensive and detailed legislative facts, as opposed to adjudicative facts. Recognition of this truth has persuaded this Court to decline to attempt to second guess such a peculiarly legislative judgment. *See e.g., Chase Securities Corp., supra.*

It is this very practical institutional inability or unwillingness of the judicial process—a court's inability to conduct surveys, polls, experiments, public hearings and other factual inquiries directed to the formulation of the rule applicable to the "broad classification", as opposed to hearing specific facts directed to the adjudication of the specific case or cases before it—that mandates affirmance of the Indiana Legislature's evaluation of just such an inquiry by it, where, as here, there is a reasonable basis for the time limit determined from that evaluation.

In short, it is beyond dispute that the ten-year statute of limitations in IC 33-1-1.5-5 achieves the legitimate legislative goals of reliance and repose. IC 33-1-1.5-5 is, therefore, rational and, under the principles of limited judicial review here applicable, must be upheld as constitutional.

Petitioner "[a]ssum[es] . . . that the State interest [behind IC 33-1-1.5-5] is to alleviate manufacturers from liability on machines which have caused injury after their useful life . . . ." (Petition, p. 7). Petitioner's assumption of such a legislative purpose for IC 33-1-1.5-5 is not supported by either the statute itself or the record.

The purpose of IC 33-1-1.5-5 is clear from the statute's terms: it has nothing to do with the "useful life" of a product, a phrase not used in the statute, but rather is to bar as untimely "any product liability action" not "commenced" "within ten (10) years after the delivery of the product to the initial user or consumer . . . . " IC 33-1-1.5-5. As discussed above, there can be little question that such a statute rationally achieves the policies of reliance and repose.

Petitioner asserts that IC 33-1-1.5-5 creates two "subclasses of tort plaintiffs based upon . . . whether the

instrumentality causing injury in a products liability suit was first sold more than ten years from the date the cause of action accrued." (Petition, p. 7). Petitioner fails to show how this asserted "classification" violates equal protection.

Petitioner's argument that IC 33-1-1.5-5 creates two impermissible classes of plaintiffs was effectively refuted in *Dague v. Piper Aircraft Corp.*, 513 F.Supp. 19, 24-25 (N.D. Ind. 1980), *aff'd*, Case No. 79 C 293 (7th Cir. 1981). Plaintiff Dague had argued, as does Petitioner here, that IC 33-1-1.5-5 improperly established an unreasonable classification between consumers injured by older products and those injured by newer products. The District Court rejected Dague's argument, holding that the ten year cut-off time is not "arbitrary or unreasonable" and "to the extent that . . . consumers of older products are unprotected, such classification [is] reasonable and rational." *Id.*

Petitioner's argument (Petition, p. 7) also implies a contention that the Indiana Legislature drew the line which separates the class of product liability claims which can be litigated from the class too stale for litigation along a yardstick of the average useful life of products which could injure the users thereof so as to give rise to such suits. Petitioner unsuccessfully so argued in the Seventh Circuit. Petitioner argues that the Legislature's determination that most such products would not be in use over ten years after their first sale is unreasonable.

In the first place, as previously discussed, Petitioner cannot show that "useful life" was in fact the Legislature's yardstick. IC 33-1-1.5-5's literal measure is the length of time between first delivery of the product and litigation over that product's alleged defectiveness, a means of classification clearly related to the ends of reliance and repose.

Moreover, even if "useful life" was the Legislature's rationale, Petitioner cannot show that rationale to be unreasonable in this forum. No doubt there are some, perhaps many, products which can be and are used for longer than ten years; conversely, there are undoubtedly some, perhaps many, products destined for the junkyard long before ten years of use, thus minimizing, if not eliminating, any risk of injury to the consumer before the ten years has passed. Such decisions are clearly ones for the Legislature, based on "legislative facts". Petitioner cannot show that it is irrational for the Indiana Legislature to decide that most of the "broad class" of products are not in use after ten years.

This Court's decision in *Duke Power Co. v. Carolina Environmental Study Group, Inc., supra,* supports the denial of review. There environmentalists sought to overturn a $560 million federal statutory ceiling on the damages for which a utility could be liable to one damaged in a nuclear accident. Applying the low-level judicial scrutiny here appropriate, this Court upheld the statute as not inconsistent with federal equal protection and due process. *Id.*, 438 U.S. at 83.

The *Duke Power* Court held that the purpose of the liability ceiling, "to encourage . . . the involvement of private enterprise in the production of electrical energy through the use of atomic power" by reducing the inhibitory effect of unlimited tort liability for nuclear accidents, was a legitimate purpose rationally served by a statutory liability limitation. *Ibid.*, 438 U.S. at 84.

As to the rationality of the $560 million per occurrence figure chosen by Congress as the appropriate liability limitation, the Court observed that "whatever ceiling figure is selected will, of necessity, be arbitrary in the sense that

any choice of a figure based on imponderables like those at issue here can always be so characterized." *Ibid.*, 438 U.S. at 86. The "imponderables" considered by Congress were "expert appraisals of the exceedingly small risk of a nuclear incident involving claims in excess of $560 million, and the recognition that in the event of such an incident, Congress would likely enact extraordinary relief provisions to provide additional relief, in accord with prior practice." *Id.*, 438 U.S. at 85. Given the somewhat speculative nature of such "imponderables", the Court held that whatever arbitrariness characterized the particular number finally chosen "is not . . . the kind of arbitrariness which flaws otherwise constitutional action." *Ibid.*, 438 U.S. at 86.

Similarly, given the imponderables of when an action becomes too old or stale to be reliably litigated, or when a contingent liability becomes so remote as to justify extinguishing it in the interests of certainty in economic planning, the Indiana legislature's choice of ten years as the length of time from the first delivery of a product within which an action based on its defectiveness must be brought under IC 33-1-1.5-5 does not demonstrate the kind of arbitrariness which flaws otherwise constitutional action. This is so because, similar to the amount of the liability ceiling at issue in *Duke Power*, the length of the statutory limitations period here at issue rationally achieves the legitimate legislative purposes of repose and reliance.

Two recent summary dismissals of appeals in asbestos cases demonstrate that review should be denied. In *Bunker v. National Gypsum Co.*, Docket No. 82-1243, ... U.S. ....., 103 S.Ct. 1761 (April 18, 1983), the Court held that

> "The appeal is dismissed for want of a substantial federal question." *Ibid.*, 103 S.Ct. at 1762.

In *Bunker, supra*, plaintiff-appellant Richard D. Bunker appealed from the Indiana Supreme Court's decision in *Bunker v. National Gypsum Co.*, 441 N.E.2d 8 (Ind. 1982), which reversed an earlier decision of the Indiana Court of Appeals, *Bunker v. National Gypsum Co.*, 426 N.E.2d 422 (Ind. App. 1981), which held that Ind. Code §22-3-7-9(e) (Burns 1974) violated the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution. That statute of limitations provided, in part, that no compensation under the Indiana Workmen's Occupational Diseases Act would be paid for occupational diseases allegedly caused by the inhalation of asbestos dust unless the claim was filed "within three [3] years after the last day of the last exposure to" the asbestos. IC 22-3-7-9(e).

The Indiana Supreme Court held that

> "We now find the statute of limitations provision of the Occupational Diseases Act to be constitutional in all respects." *Bunker v. National Gypsum Co., supra*, 441 N.E.2d at 14.

The Court will recall that appellant Bunker challenged the Indiana Supreme Court's decision on both federal due process and equal protection grounds, as Petitioner has here challenged IC §33-1-1.5-5.

Clearly, the thrust of appellant Bunker's due process and equal protection challenges to IC 22-3-7-9(e) is identical to that of petitioner Pitts' due process and equal protection challenges to IC 33-1-1.5-5. Both contend that because "there is a prolonged period between initial exposure to asbestos and the development of any disease processes which are discoverable by an individual," (Petition, p. 4),

and because such "prolonged period" assertedly varies "from ten to thirty years", (Petition, p. 3), the applicable limitations period [in IC 33-1-1.5-5, ten years; in IC 22-3-7-9(e), three years] violates federal due process because such a statute of limitations terminates "a plaintiff's right to assert a cause of action . . . at a time before which the plaintiff could not reasonably have known of the existence of that cause of action" and violates equal protection because it "absolutely bars petitioner and others similarly situated from asserting a cause of action . . . ." (Petition, p. I: "Questions Presented").

This Court rejected those contentions by its dismissal of the appeal in *Bunker*. The Court held that an appeal stating just such arguments failed to present a substantial federal question. Such a summary dismissal by this Court is a ruling on the merits in that it rejects the specific challenges to the *Bunker* decision presented by appellant Bunker in his statement of jurisdiction and leaves undisturbed the judgment of the Indiana Supreme Court. *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959); *Chicago Sheraton Corp. v. Zaban*, 593 F.2d 808, 809 (7th Cir. 1979), *cert. denied*, 444 U.S. 911; *Ahern v. Murphy*, 457 F.2d 363, 364-65 (7th Cir. 1972) (equal protection challenge to Chicago ordinance dismissed based on this Court's dismissal of appeal from Michigan Supreme Court, which had upheld a similar Detroit ordinance against an equal protection challenge).

Bunker is not the only decision of this Court on point. Essentially the same federal due process challenge as Petitioner here makes to IC 33-1-1.5-5 and as appellant Bunker made to IC 22-3-7-9(e) was made by the appellants in *Rosenberg v. Johns-Manville Sales Corp.* and *Steinhardt v. Johns-Manville Corp.*, Supreme Court Docket

Nos. 81-1614 and 81-1615, *Rosenberg v. Johns-Manville Sales Corp.*, ... U.S. ....., 102 S.Ct. 2226, 73 L.Ed.2d ..... (1982), and *Steinhardt v. Johns-Manville Corp.*, ... U.S. ....., 102 S.Ct. 2226, 73 L.Ed.2d ..... (1982).

There the New York Court of Appeals had affirmed summary judgments granted the defendant asbestos manufacturers based on the New York statute of limitations which, under pre-existing New York case law there reaffirmed, was held to commence to run on the date of the last exposure. *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008, 446 N.Y.S.2d 244, 430 N.E.2d 1297 (Ct. App. 1981).

While true that this Court "[t]reated the papers whereon the appeals were taken as petitions for writ of certiorari", and then "denied" "certiorari", *Rosenberg, supra*, 102 S.Ct. at 2226; *Steinhardt, supra*, 102 S.Ct. at 2227, rather than dismissing the appeal "for want of a substantial federal question" as it did in *Bunker, supra*, the effect is, of course, the same. Each decision of this Court left intact the decision of a State court of last resort which held that the summary dismissal of a claim for compensation for an alleged asbestos-related disease did not violate the Fourteenth Amendment. Such dismissals occurred because the claims were filed after expiration of the applicable State limitations period, even though each such limitations period was, by Petitioner's argument, shorter than the "prolonged period between initial exposure to asbestos and the development of any disease processes which are discoverable by an individual." (Petition, p. 4).

Thus, the clear import of this Court's dismissals of the appeals in *Bunker, supra*, 103 S.Ct. at 1761-62, and in *Rosenberg* and *Steinhardt, supra*, 102 S.Ct. at 2226-27,

is that certiorari should be here denied because the Seventh Circuit's decision in *Pitts* did *not* decide a federal question in a way in conflict with applicable decisions of this Court.

Petitioner's only cases not already distinguished, *United States v. Kubrick*, 444 U.S. 111 (1979) (Petition, pp. 5-6), and *United States v. Morena*, 245 U.S. 392 (1918) (Petition, p. 6), are not to the contrary. *Kubrick* involved this Court's determination as to when a federal statute of limitations, the one provided in the Federal Tort Claims Act, began to run on a federally created cause of action. *Kubrick* was thus concerned with a question of federal statutory construction. It did not involve a test of a State statute of limitations against Federal constitutional guarantees of due process and equal protection.

Kubrick does not, therefore, contradict the clear implication of this Court's dismissal of the appeals in *Bunker* and *Steinhardt*, that is, that

> "Nor is a discovery rule mandated apparently by various provisions of the Federal Constitution. See *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.1d 1008, 446 NYS 2d 244, 430 N.E.2d 1297 (Ct. App. 1981), *certiorari denied*, ... U.S. ....., 102 S.Ct. 2226, 73 L. Ed.2d ..... ." *Neubauer v. Owens-Corning Fibreglas Corp., supra*, 686 F.2d at 575 n. 4.

United States v. Morena, 245 U.S. 392 (1918) (Petition, p. 6), is even less pertinent than *Kubrick*. Not only was this Court there concerned only with a question of federal statutory construction, *Id.*, 245 U.S. at 393, but the federal statute at issue was not even a statute of limitations. *Ibid.*

CONCLUSION

Based upon the foregoing, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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